Supreme Court, U.S.
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No. 91-1455

In The

Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

Petitioner,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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22 April 1992

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Rule 24.4, petitioner Allen files this reply to respondents' brief in opposition.

Several material misstatements of law and fact taint the Respondents' Brief in Opposition, *viz.*:

FIRST. Respondents say (Brief in Opposition, pp. 2-3 n.2), apropos limiting our federal claim to fees and not damages at this stage: "By so arguing, Petitioner attempts to rewrite his pleadings to the district court." But this Court has expressly approved counsel's limiting the scope of the relief requested at the appellate stage, as we did in the Fifth Circuit below. See *Deakins v. Monagahan*, 484 U.S. 193, 199-200 (1988) (expressly noting "the effect of [counsel's] representations and our reliance thereon will have on the shape of the federal litigation.").

SECOND. Respondents repeatedly characterize Allen's success on his due process claim in the Louisiana Supreme Court as a mere technical victory amounting to nothing, *viz.* (Brief in Opposition, p. 10): "How, *at this stage*, can Petitioner's reversal be said to be anything but a 'technical victory,' which returns him to the beginning of the disciplinary proceedings, but grants him no other relief? How, exactly has the 'legal relationship' between the parties changed?" But the Board's belittling of Allen's success in the Louisiana Supreme Court on his due process claim ignores the rule of *Carey v. Piphus*, 435 U.S. 247, 266 (1978), which we recited in our certiorari petition, p. 9, and trivializes constitutional litigation contrary to Congress' and this Court's teachings:

> "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and

constitutional rights that cannot be valued solely in monetary terms. See *Carey v. Piphus*, 435 U.S. 247, 266 (1978). And, Congress has determined that 'the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in § 1988, over and above the value of a civil rights remedy to a particular plaintiff. . . . ' *Hensley*, 461 U.S., at 444, n. 4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards. . . .

> " 'The institutional behavior involved here . . . had to be stopped and . . . nothing short of having a lawsuit like this would have stopped it.' [quoting District Court]. . . .
>
> "Congress expressly recognized that a plaintiff who obtains relief in a civil rights lawsuit ' "does so not for himself alone but also as a private attorney general," vindicating a policy that Congress considered of the highest importance." ' House Report, at 2 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)). 'If the citizen does not have the resources, his day in court is denied him; the congressional policy which he seeks to assert and vindicate goes unvindicated; and the entire Nation, not just the individual citizen, suffers.' 122 Cong. Rec. 33313 (1976) (remarks of Sen. Tunney)."

Riverside v. Rivera, 477 U.S. 561, 574-575 (1986) (Opinion of Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ.).

What's more, as we informed the Fifth Circuit below (Appellant's Brief, p. 18):

> "The Louisiana State Board of Dentistry has apparently changed its procedures in direct response to the Louisiana Supreme Court's condemnation of the Board's practice of allowing its prosecutor secretly to draft decisions depriving dentists of their licenses to practice. 'The idea of the same person serving as judge and prosecutor is anathema under our notions of due process.' *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908, 916 (La. 1989). The Board's current practice is to employ 'independent counsel' to assist the disciplinary committee as to its adjudicative functions. See Appendix A *infra*, p. A-3 [herein A-3]."

THIRD. Respondents say (Brief in Opposition, p. 8), that "Petitioner's impassioned insistence on lifting the stay is blind to the difficulties posed by his request." But the supposed difficulties detailed over the remaining ten pages of the brief in opposition are *not* the reasons given by the District Court for refusing to lift the stay. The District Court made no effort at all to apply the legal standards governing interim awards under § 1988; nor did it pass on our motion for summary judgment as to liability on the due process claim sustained by the Louisiana Supreme Court; nor did it try to answer any of the questions posed by Respondents' Brief in Opposition. The only question here, we submit, is whether the District Court was duty-bound to try: "[I]f the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff *has crossed the threshold to a fee award*

of some kind." Texas Teachers Assn. v. Garland School Dist., 489 U.S. 782, 791-792 (1989), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978) (emphasis ours).

FOURTH. Respondents mischaracterize our claim in saying (Brief in Opposition, p. 7): "The cases do not stand for the proposition being urged by Petitioner that a federal court abuses its discretion *per se* by refusing to lift a stay to consider federal § 1983 claims piecemeal." Quite the contrary, what we say is that the District Court below abused its discretion in refusing access to an interim award of fees in the circumstances of this case, and not *per se*, under this Court's reading of § 1988:

> "The section states that the court 'in its discretion,' may allow a fee, but that discretion is not without limit: the prevailing party 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)."

Blanchard v. Bergeron, 489 U.S. 87, 89 n.1 (1989) (per White, J. for the Court).

FIFTH. Respondents ask (Brief in Opposition, p. 12): "Exactly which Respondents does Petitioner claim are liable for his attorney's fees at this point? He does not say, but the district court would be required to make a finding." The obvious answer, sufficient here, is those Respondents who participated in the denial of Allen's due process rights, sued in their official and individual capacities.

SIXTH. Respondents belatedly raise an Eleventh Amendment argument (Brief in Opposition, p. 12 n.6),

but this issue was not before the District Court and is not properly before this Court. And, at any rate, Congress has shut that door by coercively waiving Respondents' immunity from liability for attorney's fees under 42 U.S.C. § 1988. *Hutto v. Feeney*, 437 U.S. 678, 694 (1978); *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 738 (1980); *Pulliam v. Allen*, 466 U.S. 522, 543 (1980); *Brandon v. Holt*, 469 U.S. 464, 472 (1985).

CONCLUSION

Respondents are wrong to say that Allen's aim is to create "havoc . . . in the district court" (Brief in Opposition, p. 17). What we seek is enforcement of the will of Congress as recited in 42 U.S.C. § 1988.[1] The Fifth Circuit's holding conflicts with this Court's opinions in Section 1988 fee cases. Because this is the first abstention case to reach this Court following the State Supreme Court's vindication of the federal constitutional claim involved, the procedural question presented is of vital significance to civil rights litigation under 42 U.S.C. §§ 1983 and 1988. Certiorari should be granted.

Respectfully submitted,

PAUL R. BAIER
JAMES E. BOREN

Counsel for Petitioner

22 April 1992

[1] And pursuant to this same statute, Petitioner Allen prays for reasonable attorney's fees for the prosecution of this writ.

APPENDIX A

JAMES P. TOMASZEWSKI, D.D.S.
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RE: In re: William D. Allen, D.D.S.

Gentlemen:

On behalf of the Louisiana State Board of Dentistry please accept our gratitude for your agreeing to serve as members pro tem of the Louisiana State Board of Dentistry to hear the the above referenced disciplinary matter.

No action in this matter has been taken since August 25, 1990 when the Board members hearing this matter decided to recuse themselves. Hence, it is important to resume these proceedings as soon as possible.

The purpose of this letter is to attempt to coordinate logistics in this matter. I need information from each of your apprising me of all days in the next six months which are impossible for you to conduct the hearings pertinent to this proceeding.

All hearings shall be conducted in New Orleans. You shall be given ample notice and instructions prior to each hearing or meeting. The Louisiana State Board of Dentistry will reimburse all of your expenses as provided by

law under the state regulations, and you will be compensated at the per diem rate of $50.00 per day. I shall instruct you on how to prepare the documentation for reimbursement and per diem.

A self addressed, pre-stamped envelope is enclosed for your convenience. I look forward to meeting and working with you in this matter. If I can be of any assistance, or if you have any questions, please feel free to contact me. However, please be advised that under no circumstances can you discuss the merits of this case with myself or anyone else for that matter.

Retired Judge John C. Boutall presently serves as your independent counsel in this matter. His telephone number is (504) 834-8410. His address is 1013 Causeway Boulevard, Metairie, Louisiana 70001. You should direct any questions or concerns you have relative to the case to Judge Boutall. Direct all questions relative to travel arrangements, reimbursements, logistics, etc., to me.

Again, let me thank you for serving the public with us in this matter. Wishing you and yours a happy holiday, I remain,

Yours very truly,

/s/ C. Barry Ogden
C. Barry Ogden
Executive Director

CBO:drb

cc: James P. Tomaszewski
Guy Wootan, Esq.
Judge John C. Boutall
Paul Baier, Esq.
Wade Shows, Esq.